COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications and Energy on its own motion pursuant to G.L. c. 159, §§ 12 and 16 into Verizon New England, Inc. d/b/a Verizon Massachusetts' provision of Special Access Services	DTE 01-34

MOTION OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC. FOR PROTECTIVE TREATMENT OF CONFIDENTIAL INFORMATION

AT&T Communications of New England, Inc., requests that the Department of Telecommunications and Energy grant protection from public disclosure of certain confidential, competitively sensitive and proprietary information submitted in this proceeding in accordance with G.L. c. 25, § 5D. Specifically, AT&T requests that information on AT&T's provisioning percentages included in the D.T.E. 01-31 Testimony of Anthony Fea, and submitted in this proceeding, be granted the highest level of protective treatment because it is competitively sensitive and highly proprietary. These percentages can be found on page 9 of Mr. Fea's Testimony. A redacted version of the testimony has been provided to all parties as an attachment to VZ-ATT 2-1.[1]

[1] Mr. Fea's testimony originally was submitted in D.T.E. 01-31. The testimony was accompanied by a Motion for Protective Treatment. On September 7, 2001, the Hearing Officer denied protective treatment to Mr. Fea's testimony stating that AT&T had not fully explained why public disclosure would competitively disadvantage AT&T. *See* Hearing Officer Ruling (September 7, 2001), at 4. AT&T filed an appeal of the Hearing Officer's decision on September 14, 2001 with a full explanation of AT&T's request. A decision on AT&T's appeal has not yet been issued.

I. LEGAL STANDARD.

Confidential information may be protected from public disclosure in accordance with G.L. c. 25, § 5D, which states in part that:

> The [D]epartment may protect from public disclosure trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be on the proponent of such protection to prove the need for such protection. Where the need has been found to exist, the [D]epartment shall protect only so much of the information as is necessary to meet such need.

In determining whether certain information qualifies as a "trade secret," Massachusetts courts have considered the following:

> (1) the extent to which the information is known outside of the business;
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> (2) the extent to which it is known by employees and others involved in the business;
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> (3) the extent of measures taken by the employer to guard the secrecy of the information;
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> (4) the value of the information to the employer and its competitors;
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> (5) the amount of effort or money expended by the employer in developing the information; and
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> (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Jet Spray Cooler, Inc. v. *Crampton*, 282 N.E.2d 921, 925 (1972).

The Department has recognized that competitively sensitive information is entitled to protective status. *See, e.g.*, Hearing Officer's Ruling On the Motion of CMRS Providers for Protective Treatment and Requests for Non-Disclosure Agreement, D.P.U. 95-59B, at 7-8 (1997) (the Department recognized that competitively sensitive and proprietary information should be

protected and that such protection is desirable as a matter of public policy in a competitive market). As Bell Atlantic pointed out in a Motion for Confidential Treatment filed on October 26, 1999 in D.T.E. 99-271, "[information that provides] competitors of those carriers with valuable information regarding each individual carrier's marketing plans, entry strategy, and changes in market share… is precisely the type of data the G.L. c. 25, § 5D authorizes the Department to protect from public disclosure." *See* Bell Atlantic's Motion for Confidential Treatment, D.T.E. 99-271, at 2 (October 26, 1999).

II. ARGUMENT.

The information contained in Mr. Fea's Testimony is competitively sensitive, proprietary, and confidential. The testimony provides three percentages: (1) the percentage of customers that AT&T serves using its own facilities, referred to as "Type I" provisioning; (2) the percentage of customers that AT&T serves using equipment and facilities leased from other carriers, otherwise known as "Type II" provisioning; and (3) of that Type II provisioning, the percentage of facilities leased from Verizon. The possession of the information regarding these three percentages would provide AT&T's competitors with a significant competitive advantage.

The information in Mr. Fea's testimony provides insight into AT&T's internal decision-making processes and sheds light on AT&T's marketing plans and entry strategy. Competitors will know how often AT&T decides to build facilities to serve customers and how often AT&T decides to lease facilities from other carriers to serve customers. Moreover, to the extent that customers perceive that AT&T's level of customer service depends on its "Type" of provisioning, disclosure of this information gives competing carriers knowledge which they can use to influence customer perceptions about the level of service AT&T provides.

Mr. Fea states in his testimony that the "most common" AT&T provisioning method is Type II.[2] By this statement, AT&T has not revealed competitively sensitive information. There is a significant difference between knowing the *minimum* percentage of leased facilities a number *could* be and knowing the specific number that comes close to the actual percentage. There is no competitive consequence to revealing that AT&T's figure is something more than 50% because it is generally known that almost all of AT&T's competitors will provide at least 50% of their services over leased facilities. However, it would provide a distinct, and unfair, advantage to AT&T's competitors if they knew whether AT&T is relying on leased facilities for provisioning 51% of its services or whether AT&T is relying on leased facilities for providing 99% of its services.

One factor affecting the quality of service that a CLEC can provide is the extent to which it must lease facilities from the ILEC. A carrier that knows the exact percentage of customers that a competing carrier provisions by leasing facilities can capitalize on that information for marketing purposes (*i.e.*, state that they provision 5% or 10% fewer customers using leased facilities) and therefore gain an unfair competitive advantage. Customers differentiate carriers on the basis of the extent to which carriers use their own network facilities as opposed to leased facilities. The attached Affidavit of Joseph Stack, originally submitted in the D.T.E. 01-31 proceeding, supports these facts.

Furthermore, the information for which protection is sought was developed by AT&T at AT&T's expense for its own internal purposes and AT&T's own handling of this information

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[2] Fea Testimony, at 9.

demonstrates its sensitive nature. This information is not publicly available, is not shared with non-AT&T employees and is not considered public information.

In short, the information is not readily available to competitors and would be valuable to them in developing competitive marketing strategies. AT&T is likely to suffer competitive disadvantage if this confidential information is made public. No harm will result if the information is protected because it will still be available for use in this docket. Balancing the public's "right to know" against the public interest in an effectively functioning competitive marketplace, the Department should continue to protect information that, if made public, would likely create a competitive disadvantage that inhibits the full development of a competitive marketplace.

Conclusion.

For these reasons, AT&T requests in accordance with G.L. c. 25, § 5D, that the Department grant its Motion for Protective Treatment of the above-discussed percentages on page 9 of the Testimony of Anthony Fea. This information is entitled to protective treatment for at least five years. After five years, there will be sufficient change in the market so that the proprietary information contained in these percentages will no longer be relevant.

Respectfully submitted,

AT&T COMMUNICATIONS OF NEW ENGLAND, INC.

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Jeffrey F. Jones, Esq.
Kenneth W. Salinger, Esq.
Jay E. Gruber, Esq.
Katherine A. Davenport, Esq.
Palmer & Dodge LLP
111 Huntington Avenue
Boston, MA 02199
(617) 573-0449

Mary E. Burgess
111 Washington Ave
Room 706
Albany, New York 12210
(518) 463-3148 (voice)
(518) 463-5943 (fax)

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